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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA,
Petitioner,
v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENT, SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

KENNETH W. COTTON
WIPF & COTTON
P.O. Box 370
Wagner, South Dakota 57380
(605) 384-5471
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SUPPLEMENTAL BRIEF OF RESPONDENT, SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

This Supplemental Brief of Respondent Southern Missouri Waste Management District, in Support of Petitioner State of South Dakota, is submitted in response to the *Amicus Curiae* Brief for the United States, pursuant to Rule 25(5).

ARGUMENT

I. THE PREVIOUS SUBMISSIONS OF THE UNITED STATES REGARDING THE DISESTABLISHMENT EFFECT OF CESSION AGREEMENTS ARE CLEARLY CORRECT.

> MR. MANN: Well, the language in *DeCoteau* said that the Indians cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in the land in question, and the statute in *Rosebud* stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.
>
> *It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.*
>
> QUESTION: I think you're probably right. . . .

Tr. of Oral Argument at 25, *Hagen*, (No. 92-6281), Dist. Supp. App. at 31a-32a (emphasis added).

A. Introduction.

The United States, as *amicus curiae*, recently submitted a Brief in this case because of a "strong interest in protecting the integrity of reservation boundaries." Br. for the United States Supp'g Respt's at 1, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581). The arguments of the United States generally reflect that position.

What is not clear from the Brief of the United States is the context in which the United States has submitted

other, often conflicting cession arguments, as well as other similar arguments to this Court in similar cases. In those instances, this Court has, more often than not, squarely rejected the overall position of the United States—and for good reason. In the process, the cession concessions of the United States have never been questioned. The purpose of this Supplemental Brief is to place the new arguments of the United States in proper context and summarize the reasons why this Court should, once again, reaffirm its own clearly correct cession jurisprudence.

B. Excerpts Containing The Complete Oral Arguments Of The United States Confirm This Position.

As an overview, we have appended, for the convenience of the Court, excerpts containing the complete arguments of the United States from each of the transcripts of the oral arguments, such as that highlighted above. Tr. of Oral Argument at 13-21, *Mattz*, (No. 71-1182), Dist. Supp. App. at 1a-6a, Tr. of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau*, (No. 73-1148), Dist. Supp. App. at 7a-17a, Tr. of Oral Argument at 18-30, *Rosebud Sioux Tribe*, (No. 75-562), Dist. Supp. App. at 18a-26a, Tr. of Oral Argument at 18-27, *Hagen*, (No. 92-6281), Dist. Supp. App. at 27a-33a.

In context, the transcripts shed a different light on the present views of the United States. For example, since the decision of this Court in *DeCoteau*, the United States candidly and repeatedly has acknowledged that Congress routinely intended cession statutes such as this to disestablish reservation areas. Dist. Supp. App. 18a-33a. The United States has never attempted to circumvent this type of cession since *DeCoteau*, openly acknowledging, as in *Hagen*, that it would be "rather difficult" to support any other construction. *Id.* at 32a. In this case, the United States ignored that analysis and instead supported the "narrower" position ultimately adopted by the Court below:

> The key question in interpreting the 1894 statute and agreement is whether Congress intended that the tribe's governmental authority be transferred with the land sale. Amicus *United States* argues that the 1858 treaty gave the tribe governmental authority within the treaty boundaries and that Article XVIII *requires* that the agreement be read to preserve that right. Although the cession language in Articles I and II could be viewed as describing a transfer of tribal governmental authority as well as land, thereby changing the 1858 treaty boundaries, the *narrower* reading is that the 1894 act simply authorized the conveyance of real property . . . . leads to the conclusion that Congress intended by its 1894 act that the Yankton Sioux sell their surplus land to the government, but not their governmental authority over it.

Yankton Sioux Tribe v. Southern Missouri Waste Mgmt. Dist., 99 F.3d 1439, 1448, 1457 (8th Cir. 1996), Pet. App. at 19-20, 43-44 (emphasis added).

Nothing of substance could be cited by either the United States or the panel majority to support this anomalous and otherwise "rather difficult" construction. Dist. Supp. App. at 32a. Moreover, the District would submit that the prior views of the United States summarized above preclude this "narrower" view—at least in the absence of some *affirmative* evidence of congressional intent to the contrary. In this respect, generic arguments loosely tied to Article XVIII will not suffice. Article XVIII was not intended to alter the fundamental attributes of the Yankton cession—*and not a single word in any of the Yankton documentation says otherwise.*

II. NOTHING IN THE YANKTON DOCUMENTS SUBSTANTIATES THAT ARTICLE XVIII WAS INTENDED TO ALTER THE FUNDAMENTAL ATTRIBUTES OF THE YANKTON CESSION.

A. The United States Has Not Addressed The Decision Of The State Supreme Court In *Greger* Because The Arguments Set Forth In That Opinion Cannot Be Readily Refuted.

The Supreme Court of the State of South Dakota demonstrated that point in *South Dakota v. Greger*, 559

N.W.2d 854 (S.D. 1997) and the manner in which the United States has treated that decision should at least be brought to the attention of this Court. In the past, this Court has granted petitions in cases such as this to resolve conflicts between the state and federal courts. *See, e.g., DeCoteau*, 420 U.S. at 428 n.2; *Hagen*, 510 U.S. at 409. The District assumes that similar considerations were important in this instance because of the conflict on this federal question between the decision of the Eighth Circuit Court of Appeals in this case, *Yankton Sioux Tribe*, 99 F.3d 1439, and the decision of the Supreme Court of the State of South Dakota in *Greger*. Robert L. Stern, *et al., Supreme Court Practice*, Sec. 4.9 at 181 (7th ed. 1993). We further understand that this Court is the final arbitrator of matters of federal law decided by either federal or state court—which brings us to the omission of the United States that merits special attention. That is, the manner in which the Brief for the United States completely *ignores* the decision of the Supreme Court of the State of South Dakota in *Greger*. *In this respect, Greger is not cited, mentioned or discussed on any page in any argument in the Brief for the United States.*

The District thinks the treatment accorded the Supreme Court of the State of South Dakota by the United States is significant in several respects. Even apart from fundamental considerations of comity, the notion that a 30-page unanimous opinion of a State Supreme Court, documented in all substantial respects, could be wholly ignored in this fashion in a friend of the Court brief submitted by the United States, is truly remarkable. Irrespective of whether or not one agrees with the District's position (that the *Greger* Court was correct and that the points relied upon in *Greger* are not responded to simply because they cannot be readily refuted), the fact that the United States did not even attempt to do so remains significant. It colors the entire Article XVIII submission of the United States.

One example from *Greger* clearly illustrates the point. In the brief, the United States goes to great lengths to

fashion an argument that depicts continued federal recognition of the Yankton reservation. The *Greger* Court convincingly dispels that notion by simply highlighting an important and uncontested jurisdictional fact. *Greger*, 559 N.W.2d at 859-861, 866, Pet. App. 154-155. For a century, the State of South Dakota, and not the federal government, has been the party exercising jurisdiction over the contested area, which certainly would not have been the case if the area had remained within the limits of an Indian reservation. *Id.* In this light, the Article XVIII argument, supported by isolated references by Congress to a "Yankton reservation," decades apart, and other unrelated sources that the United States now recounts, pales in comparison to this *uncontroverted* assertion of state jurisdiction. Br. for the United States Supp'g Resp'ts at 24-26, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581).

In other instances this Court has given great weight to a history of reliance on State jurisdiction. *Rosebud*, 430 U.S. at 605; *Hagen*, 510 U.S. at 421. The United States cannot avoid this factor by simply refusing to address the opinion of the Supreme Court of the State of South Dakota.[1]

B. Article XVIII Does Not Figure Prominently In The Yankton Documentation.

1. The "Form Agreement" the United States has lodged with the Clerk undermines the significance of Article XVIII.

The instructions of the Commissioner of Indian Affairs to the Yankton Commissioners are silent with regard to anything like Article XVIII. *See* Letter from Comm'r

[1] The manner in which the United States summarily disregards the dissent by Judge Magill in the court of appeals should also be noted. In the Brief for the United States the dissent is mentioned only in the "Statement" (in one sentence) and there it is unfairly characterized as relying on Article I and Article II "alone." Br. for the United States Supp'g Resp'ts at 6, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581).

J.T. Morgan of the Dep't of Interior to Comm'rs (July 27, 1892), *reprinted in* Br. of Resp't So. Mo. Waste Mgmt. Dist. at app. 49a (Apr. 28, 1997) (No. 96-1581). Likewise, the "form agreement" enclosed with the instructions (and now "lodged" with the Clerk of this Court by the United States) contains no such language. *See* Form Agreement *ibid*. The "form agreement" does, however, contain "cession language" which this Court has subsequently described as being "precisely suited" to disestablishment. *DeCoteau*, 420 U.S. at 445. The members of Congress obviously did not see the inclusion of Article XVIII as preserving reservation boundaries or as inconsistent with the instructions. Indeed, Congress perceived that the Commisioners had obtained the "cession" in accordance with "past policy" and following "in the same line."

> MR. PICKLER. Certainly these commissioners have general instructions from the Secretary of the Interior to do what they do. He lays down the rules and regulations to guide them, and fixes the general scope of their duties. . . . That commission was organized by the Secretary of the Interior and was sent out with general instructions. . . . These commissioners went out in good faith; the Secretary of the Interior gave them their instructions; they kept within their instructions; they have made an agreement for these lands; and now Congress ought to live up to the agreement. . . . [W]e simply procure these lands in the same way we have always procured lands from the Indians. We make no departure from our past policy; we are following in the same line.

26 Cong. Rec. 8265, 8267, 53d Cong., 2d Sess. (1894), J.A. 405-522.

Nothing in the congressional debate in fact refers to Article XVIII, much less does it indicate any intent to retain reservation boundaries.

2. The Transcript of the Yankton Negotiations Confirms that Article XVIII was Understood to Address Annuities and not Reservation Boundaries.

The transcripts that record the Yankton negotiations are also silent with reference to any reservation boundary discussion even remotely related to Article XVIII. S. Ex. Doc. No. 27 at 47-101, 53rd Cong., 2d Sess. (1894), J.A. at 203-359. There is certainly no discussion that even arguably supports retained reservation boundaries in the face of this cession. The United States evidently concedes this fact because *no transcript excerpts* are set forth or cited by the United States (or anyone else) in support of a different conclusion. Annuities, and not reservation boundaries, were the only subject of discussion. *Id.* In addition, even the possibility of any other understanding with respect to reservation boundaries is completely undermined by repeated references to cessions of the past, including the Sisseton-Wahpeton cession construed in *DeCoteau—another critical point the United States never addresses.*

3. The Formal Report of the Yankton Commissioners does not Refer to Article XVIII or Mention any Retained Reservation Boundaries.

When the Yankton Commissioners formally reported back to the Commissioner of Indian Affairs (as reported to Congress), the Commissioners stated (under a subheading of "Baseless Claims") only that:

> The Indians, partly through ignorance and partly through craft, presented to us a long list of claims and grievances. They claim that they had not received their dues under the treaty of 1858; that they had a claim against the Government for land in Iowa and many such baseless and imaginary wrongs. We did not find it difficult to meet these charges to the satisfaction of most of the Indians. . . .

S. Ex. Doc. No. 27 at 21, 53d Cong., 2d Sess. (1894), J.A. at 155.

Nothing else about Article XVIII was even mentioned.

4. The Commissioner of Indian Affairs Simply Listed the Terms of Article XVIII (And Later Concluded ~~in~~ His Annual Report that the Agreement would Restore the land to the "Public Domain").

In his Report to the Secretary of the Interior, the Commissioner of Indian Affairs did list Article XVIII in chronological order and stated without any further comment that:

> Article XVIII provides that nothing in the agreement shall be construed to abrogate the treaty of April 19, 1858, and that the Yankton Indians shall continue to receive their annuities under said treaty.

Id. at 4, J.A. at 115.

The Commissioner of Indian Affairs' formal views on the Yankton agreement were set forth in his Annual Report. Annual Report of the Comm'r of Indian Affairs (1894). He concluded that the agreement would restore the lands to the public domain (as did the Secretary of the Interior). *Id.* at 28, excerpted in Br. of Resp. So. Mo. Waste Mgmt. Dist. in Supp. of Pet'r at app. 42a; Report of the Sec'y of the Interior, H. Exec. Doc. Vol. 14, 53d Cong., 3d Sess. at IX (1894-95), excerpted in Br. of Resp. So. Mo. Waste Mgmt. Dist. in Supp. of Pet'r at app. 44a. After the Proclamation and Opening the next year, the Yankton Reservation was deleted from the official cartographic Departmental maps showing Indian reservations in the United States, which was appended each year to the Annual Report.

As a result, the contemporary administrative record really does not support the claim of the United States that the: "federal government's *conduct* with respect to the Yankton Sioux Reservation, while not entirely consistent, *suggests* that no diminishment was intended." Br. for United States as *Amicus Curiae* Supp'g Resp'ts at 24, *South Dakota v. Yankton Sioux Tribe* (96-1581) (emphasis added).

III. THE ARTICLE XVIII ARGUMENT OF THE UNITED STATES DOES NOT FOLLOW THE REASONING OF *ROSEBUD* AND IT SHOULD BE REJECTED.

In the final analysis, the entire argument of the United States also ignores the most important part of the "cession" discussion in *Rosebud*. *Rosebud* is instructive and applicable to the Article XVIII argument. In the process of explaining why it made no difference that the operative cession language in the 1904 Rosebud Act was technically *misused*, the Court in *Rosebud* concluded that this type of *ambiguity* was relatively *unimportant* insofar as the *meaning* of the *entire act* was concerned:

> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the *meaning* of the Act *ambiguous* as *between* diminution of the Reservation boundaries on the one hand, and merely opening up designated lands for settlement by non-Indians, on the other. The word is technically misused, but the *meaning* is quite clear. It was *intended* to accomplish, in 1904, precisely what it was intended to accomplish in 1901.

Rosebud, 430 U.S. at 597-598 (emphasis added).

Any ambiguity involving Article XVIII, which, of course, is not even in the operative language of the Yankton agreement, cannot, *following the reasoning of Rosebud*, be determinative of the *meaning* of the Yankton Act. The fundamental error of the panel majority was the failure to recognize this important conceptual distinction, which the United States failed to make. To paraphrase *Rosebud*, the Yankton cession was intended to accomplish in 1894 precisely what similarly referenced cessions accomplished in 1891 (*DeCoteau*) and in *all* previous years.

IV. THERE IS NOTHING NEW IN THIS OR ANY SAVINGS CLAUSE ARGUMENT.

The last point that needs to be made is that there is really nothing new in this savings clause argument or any savings clause argument. Prior to the decisions of this Court in *DeCoteau* and *Rosebud*, which placed the issue in a proper historical perspective, similar savings clause arguments were routinely submitted in support of a recognition of original reservation boundaries. In fact, the court of appeals relied on the one case (decided before *DeCoteau* and *Rosebud*) that found such a savings clause argument to be persuasive. *Yankton*, 99 F.3d at 1448, 1450, citing *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), Pet. App. at 20, 24. *But see Yankton*, 99 F.3d at 1460 n. 31, Pet. App. at 50. However, subsequent to *New Town*, this Court decided the two cases that should have authoritatively put savings clause arguments to rest. In *DeCoteau*, this Court made the significance of the cession process crystal clear. *See also Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). And in *Rosebud*, the savings clause argument was mentioned only in the dissent. *Rosebud*, 430 U.S. at 623. *See also Oregon*, 473 U.S. 753.[2] The United States participated in these cases and is surely aware of the arguments that were advanced and rejected. In the court of appeals, the precedent of this Court would have been better served if more attention could have been directed to the significance of *DeCoteau*, *Rosebud* and *Oregon*.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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[2] The United States essentially ignores the cession analysis in *Oregon*, 473 U.S. 753, mentioning the decision only once to note that it quoted a savings provision. Br. for the United States as *Amicus Curiae* Supp'g Resp'ts at 12, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581).

Respectfully submitted,

KENNETH W. COTTON
WIPF & COTTON
P.O. Box 370
Wagner, South Dakota 57380
(605) 384-5471
Counsel for Respondent

November 1997

APPENDIX

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APPENDIX

Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182).

[13] ORAL ARGUMENT OF
HARRY R. SACHSE ON BEHALF OF THE
PETITIONER AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

The United States agrees with the position taken by Mr. Sclar and by the petitioner in this case. What I want to try to do is put this 1892 Act into a little bit of historical perspective.

As Mr. Sclar said, the Yuroks always lived in this area. Twice they had their reservation recognized by Executive Order, 1855 and 1891. The 1891 Act was an obvious reaction to the legal problems that had been recognized in the 1889 Court of Appeals case.

In 1892 it may be that the House of Representatives set out to take from these Indians much of what had been theirs. But what the House set out to do, the Senate corrected. And there is a very marked contrast between the Act that was finally passed and the Act that was introduced in the House. The Act as it was finally passed in our view is quite clearly a special allotment Act similar to a number of other allotment Acts that were passed in that general time and which did not terminate the reservation in question.

I would like to first mention something about the [14] General Allotment Act. I think that's important in this. By the 1880's most of the Indian reservations had been created. But there was a pressure by the settlers around those reservations to get some of the land in the reservatons. They felt the Indians were not utilizing that land. And on the other hand there was a pressure to keep faith with the Indians and not to take from them what had

recently been given to them. A sort of compromise was worked out in the General Allotment Act of 1887 called the Dawes Act. It has subsequently been repudiated in the Indian Reorganization Act of 1934. The Dawes Act set up this system, that whenever the President thought it was wise to do so, he could require all the Indians within a reservation to take allotments of a particular number of acres each. This would usually leave considerable land in the reservation that was not allotted. The President then with the consent of the Indians, which it was assumed in those days he could obtain, would open the rest of the reservation for homesteading, but the fees charged to the homesteaders would be used for the benefit of the Indians who lived on the reservation.

Now, that was the General Allotment Act. The General Allotment Act did not require the President to open any particular reservation in this way. And Congress passed a number of special allotment Acts. We have listed those that have been in litigation on page 22 of our brief, Footnote 18. [15] These special allotment Acts would take the matter out of the hands of the President and tribe and Congress would say, "We want allotments made on a particular piece of land. We want, once the allotments are made, we want to open the rest of it to settlement, and we want funds collected from the settlers to be administered by the Government for the benefit of the Indians that lived on that land."

Many of the special allotment Acts made particular reference to the General Allotment Act saying that the allotments would be made under the terms of the General Allotment Act.

It's very significant that the funds obtained in such an Act were to be used for the benefit of the Indians who remained in the reservation. And this meant, of course, a continued Federal involvement with that reservation, both in handling the land transactions and in administering the funds that would be created by this procedure.

In our view, the 1892 Klamath River Act is that kind of special allotment Act. In our brief when we cited the language of the Act, we put in dark provisions, the part added by the Senate, which together with the final paragraph that had been there all along make this Act exactly a special allotment Act of the area of that reservation that was affected.

QUESTION: Ultimately homesteaders' land would be [16] within the reservation?

MR. SACHSE: That's correct.

Now, this Court early—

QUESTION: Would you take the same position even if some was allotted, some was homesteaded and the people and all the restrictions on the allotments had expired and the allotted lands had been sold to whites?

MR. SACHSE: Unless Congress had in some—we don't reach that issue here because there still is allotted restricted land in this reservation.

QUESTION: Well, let me ask you. In an Indian reservation that's along a river, who owns the bed of the river?

MR. SACHSE: Well, in this case, this Court in *Donnelly* has already held that the Indians own the bed of that river. It has never been taken from them.

QUESTION: And that has never been allotted to anybody, has it?

MR. SACHSE: It has never been allotted to anybody. That's still communely held Indian land as far as we are concerned, and there is not a word in the 1892 Act—

QUESTION: Whether the reservation exists or whether it doesn't, and regardless of who owns the river bed, is there some treaty or some law defining Indian fishing rights? Or is it just ancestral fishing rights that have been—

[17] MR. SACHSE: It's somewhere between the two. There were ancestral fishing rights, but this Court in *Donnelly* held specifically that the 1891 Extension that ran

snaking 40 miles down the river was done specifically to preserve the fishing rights that the Indians had.

QUESTION: Which were what?

MR. SACHSE: I think the exclusive rights to fish in that river.

QUESTION: The exclusive right to fish there?

MR. SACHSE: Since it was made an Indian reservation, the purpose of which is that this area is to be reserved for the Indians, and since surplus lands were sold but nothing was done—

QUESTION: You would say, then, I suppose, that since the Indians owned then and still own the bed of the river, that even if all of the riparian land was in other ownership, the Indians would have the exclusive right to fish in the river?

MR. SACHSE: I would say—yes, I would say that. But I don't think this case requires us—

QUESTION: Don't you have to hold that? Because there is some river riparian land that is not owned by the Indians.

MR. SACHSE: Well, here is the way I would analyze this case, but I think what you have raised is also a possible [18] analysis, a possible way to handle the case.

The 1891 Act established an Indian reservation, a mile on both sides of the river including the river and going all the way down to the sea. This Court in *Donnally* held that one of the primary purposes of establishing that reservation was to secure to the Indians fishing rights of that river. That reservation has never been abolished. The 1892 Act which let other people than Indians settle in this area while preserving also Indian settlement, simply did not abolish the reservation. So the reservation is still an area of Federal jurisdiction and protection, except to the extent that Public Law 280 has given the State of California certain criminal and civil jurisdictions in it. Public Law 280 specifically reserves federally granted fishing rights and these were granted by Executive Order as this Court held in *Donnelly*.

QUESTION: That still leaves the question of what—you said "exclusive."

MR. SACHSE: No. Let me say this. The issue was not argued below as to exactly what the consequences of this being held to be an Indian reservation. The court went up on the question it was not a reservation.

QUESTION: The scope of the Indian rights and whether or not the kind of fishing the Indians now want to do is the kind of a fishing right that was historically exercised has not been settled.

[19] MR. SACHSE: That is correct. And we have only asked this Cout to determine the question of whether this remains Indian country, whether this remains an Indian reservation, with a remand after that has been determined to the California courts.

QUESTION: You think that it may be irrelevant whether the reservation exists or not if it's true that the Indians still own the bed of the river.

MR. SACHSE: I don't think it would be irrelevant. I think it would matter from the standpoint of criminal and civil jurisdiction. It would only be irrelevant if the Court were to find that Public Law 280 had granted such total jurisdiction to the State of California that even if it is a reservation all that is left is the ownership of the river. So I think it still is relevant.

I would like to get back to the specific point that this Court is faced with, and that is has this allotment process terminated the reservation. And because I am running out of time, I would just mention this very quickly. That in *United States v. Celestine*, the Court first had to determine this problem, 215 U.S. And in that case the Court held in a careful opinion that the General Allotment Act is inconsistent with termination of a reservation, that allotments under that Act and even disposal of lands to non-Indians does not terminate a reservation. In *United States v. Nice* at 241 U.S.—these [20] are all in our brief—the Court held that a special allotment Act should be interpreted in accordance with, policy in the

General Allotment Act and that a special allotment Act on the Sioux reservation though it required the Sioux to take, on that reservation, allotments, required the President to dispose of the extra land, did not terminate Federal jurisdiction, did not terminate the reservation, did not terminate Federal jurisdiction even as to the land that was disposed of to non-Indians.

This same policy is recognized more recently by this Court in *Seymour v. Superintendent* and also has been codified by Congress in its definition of Indian country as including all the land within the boundaries of an Indian reservation whether patented or allotted or not.

There have been two very recent cases we mention in our brief also, one in the Eighth Circuit, *City of New Town*, and another in the Supreme Court of South Dakota, *State v. Molash*, that had this same consistent interpretation of special allotments Acts indistinguishable from the 1892 Klamath River Act.

In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation. "The Smith River Reservation is hereby discontinued," Congress said. Or. "The reservation lines [21] of the Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished." There has been no confusion between an Act that simply opens the reservation to allotment and settlement and one that abolishes the boundaries of a reservation.

Thank you.

* * * *

Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148).

[9] ORAL ARGUMENT OF
HARRY SACHSE, ESQ., FOR THE
UNITED STATES AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

I want to say a word first about any Indian reservation, before talking about this one, because it seems to me that the discussion so far has been a bit confusing about that.

In almost every Indian reservation in the country there's land that has been allotted to Indians, there's land that has been sold in fee simple to people who are not Indians. There's often a large non-Indian population inside an Indian reservation.

One of the characteristics of this reservation is that there's such a large Indian population inside, and that there's a going tribe, with an organized government and an agency of the BIA, and a very alive and viable situation.

Basically, and without trying to get into all of the details of it, the State in which an Indian reservation is [10] situated has full jurisdiction over non-Indians who live inside an Indian reservation, both civil and criminal jurisdiction. This Court held so in a number of cases, starting in the Nineteenth Century with *McBratney* and *Draper* which were criminal cases. And Justice Frankfurter laid this out in a good deal of detail in *Cake vs. Egan* and the *Metlacotla* cases in about 380—

QUESTION: Is that civil as well as criminal?

MR. SACHSE: Civil as well as criminal.

QUESTION: *Cake v. Egan*—

QUESTION: Irrespective of whether they live on allotted lands?

MR. SACHSE: Irrespective of where they live within the—

QUESTION: But in present actions with an Indian, they're going to be subject to federal law.

MR. SACHSE: Correct. If the transaction is with an Indian or affects the vital interests of the tribe, they're going to be subject to federal law. The exact extent of that is the kind of thing that's still debated before you, in a case such as the *Maserie* case that's under advisement.

QUESTION: And it may be debated eventually in this case, I take it?

MR. SACHSE: And may eventually be debated here.

Now, I think I need to review some law concerning [11] this Treaty as well as—this reservation, as well as the facts.

First, briefly to the facts:

A permanent reservation was established by Treaty in 1867, with surveyed boundaries. And it's this reservation, which is much smaller than the land the Indians had previously had. They had already had their big loss of land, and this was what was left to them, after great amounts of land had been taken away from them.

Then, by an agreement in 1889, made specifically under the General Allotment Act; and at a time when the Indians were in great distress, that the moneys owed to them by the federal government had not been paid to them, it was the middle of winter.

The federal government negotiated with the tribe to do what's known as open its reservation. That is, to allow the sale of surplus land within the reservation. And in this agreement and then in the Act of Congress that ratified it, there are numerous references to the General Allotment Act. There is no such thing as was true with the north half of the Colville Reservation, where a particular part of the reservation was cut off and express language was used, saying that that has been removed from the reservation.

You've heard some talk about the public domain. What's important in this Act is there is no language saying [12] that this was returned to the public domain.

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession", that is correct.

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is no specific area ceded, what's ceded is what is not allotted—

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I—I don't know what you mean by that.

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded,—

QUESTION: Yes?

MR. SACHSE: —the government sold that land under—

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it—

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective.

[13] But the Indians were paid for the land. How were they paid for it? It was put in the Treasury of the United States, to be used for their benefit. In other words, it's a bookkeeping entry from one government place to another. The money—the Indian Agency was maintained, the money was appropriated by the government as needed for the Indians. The land was opened for homesteading but only for homesteading, not for any purpose.

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You have the exact same actual dynamics that occurred in the south half of the Colville Reservation, which this Court held in *Seymour v. Superintendent*, did not abolish that reservation.

The same dynamic that was done in *Mattz v. Arnett*, as to that reservation; namely, the non-Indians got what they wanted, the Indians got what they could. The non-Indians got the right to settle that land. The Indians got the money from the settlement of that land, which was small enough.

The question remaining is: What happened to the federal jurisdiction? What happened to the jurisdiction of the tribe?

And I want to approach that problem now.

QUESTION: Would it be fair to say that the United States in those transactions was acting as the broker for the Indians, to announce publicly that settlers could come in and buy it for $2.50 an acre?

[14] MR. SACHSE: It's exactly so, and we quote in our brief where one of the Senators objected to the cession idea, to the fact that the government would pay the money immediately.

And one of the other Senators explained to him, said: This doesn't mean anything, because this is just a bookkeeping transaction in the Treasury. We get right back the money that we're going to pay to the Indians, as we sell off the land.

Now, in some later Acts, the government decided to do it the other way, to not pay the Indians at first, to only pay the Indians as the land was sold.

But the practical effect of both kinds of Acts is identical, that the Indians kept, lived on the allotted land, the unallotted and was opened up for homesteading, because it was thought in this—this was said to the Indians in the negotiations, and the Court talked about this in *Mattz*—this Court talked about this in *Mattz vs. Arnett*.

The excuse for doing this kind of thing was that it was for the benefit of the Indians to do it, that it was better

for them to live next to a high caliber of citizen who would be farming his land, and so forth. That's the kind of language that was used.

And that was the same whether the Indians said they ceded it first, or said—or the government acted as agent, disposing of it.

And, by the way, this language "cession" in the *Ash* [15] *Sheep* case, which we discuss in our brief, is used in connection with an arrangement where the government only acted purely as agent, where they simply—whenever someone wanted a piece of the land, would sell it to him then, and give the money to the Indians. The word "cede" was used.

But obviously with no technical—

QUESTION: What impact, if anything, did the cession have, followed by the sale for homesteading or the settlement for homesteading? What happened as a consequence, or what was the impact with respect to the jurisdiction of the State, if anything?

MR. SACHSE: Of the State? None. None.

The cession of the land or the selling in fee simple of land inside an Indian reservation, say, as in the reservation in *Mattz*—in *Seymour vs. Superintendent*, the south half of the Colville. That then is land owned by a non-Indian inside an Indian reservation.

QUESTION: Well, yes, but you would apparently think the State has civil and criminal jurisdiction over non-Indians on that.

MR. SACHSE: Clearly.

QUESTION: How about the State's trespass law?

MR. SACHSE: The State's—the State's trespass law would clearly apply to non-Indians, but that would be—to the extent that it is applying—

[16] QUESTION: Well, how about to the owner—how about the owner of the deeded land, the ceded land, he now has a fee simple title to it—

MR. SACHSE: Okay.

QUESTION: —and he wants to keep people off his land, and he does it in the name of the State's trespass law. May he do so?

MR. SACHSE: I don't think he could keep an Indian from—

QUESTION: Really?

MR. SACHSE: It seems to me that inside an Indian reservation—

QUESTION: Well, let me talk to them about—

MR. SACHSE: Yes?

QUESTION: —a non-Indian. Can he keep a non-Indian off in the name of the State's trespass law?

MR. SACHSE: Clearly, yes.

QUESTION: So the State's law does apply there.

MR. SACHSE: What I'm saying is that in a transaction between an Indian and a non-Indian—

QUESTION: Well, I didn't ask you about transaction, Mr. Sachse, I asked you about the State's trespass law.

Does the State—after the land is deeded, does the State's trespass law apply to that land?

Certainly it doesn't—

[17] MR. SACHSE: It applies to that land as to non-Indians but not as to Indians.

QUESTION: So an Indian—

MR. SACHSE: The State's criminal law does not apply to Indians inside an Indian reservation.

QUESTION: And so it just—so the State sovereignty just doesn't apply to that land, no matter who it's owned by, as far as keeping an Indian off of it is concerned?

Is that your thesis?

MR. SACHSE: I think that's correct. That would be under federal law or under tribal law, if it's a matter affecting an Indian inside an Indian reservation.

Now, the General Allotment Act left a lot of questions unresolved. And the early questions that were unresolved was whether a reservation existed at all after there had been allotments, and whether even allotted land was Indian land under federal jurisdiction.

And the Court first addressed that question in 1909, in *U.S. v. Celestine*, in which it held that even though land had been allotted to an Indian and patented to the Indian, that the land remained inside the Indian reservation, that no land was removed from an Indian reservation until it specifically removed by Congress from the reservation.

That proposition was extended in 1916, in *United* [18] v. *Nice* which held that the tribal relations of the Indians continues and that federal liquor laws would apply to Indians anywhere within the reservation. But, the important thing was this, that the States were claiming, just as the State claims here, that opening a reservation and alloting lands to Indian meant that federal jurisdiction and tribal jurisdiction would only apply on the allotted lands. This creates several problems, one's the obvious one of having to check plat books to see whose jurisdiction applies where, the other one's even a bit more complicated, these red dots move around, the Tribe buys new land, land can be consolidated. As under a recent act of Congress, this Tribe has an active program of purchasing new land which Congress described as within the reservation. Thereby, again recognizing that the reservation still existed.

QUESTION: Must have been the situation for a good many years?

ANSWER: Thats right.

QUESTION: Hasn't been a great deal of trouble about it, has there?

ANSWER: Well, I think there has. What has really occured is that there has been no law and order on a lot [19]of Indian reservations. And part of the problem has been that the federal government hasn't done its job, the State hasn't done their job, and the tribes have been too weak to do anything.

QUESTION: Well, what is the State's job? What does this State—on an Indian reservation?

MR. SACHSE: In this—in a reservation—

QUESTION: On an Indian reservation, what is the State's responsibility, if any?

MR. SACHSE: The State's responsibility in an Indian reservation is as to non-Indians, to maintain law and order in matters between non-Indians. The federal government and the tribe have responsibility of maintaining law and order in matters that affect Indians.

And neither one of them should have to look at the plat book to do it. It's a question of whether the person is Indian or non-Indian. That's a difficult enough problem, without having to figure out whether a policeman can go on this piece of ground or that piece of ground.

QUESTION: Does a non-Indian ever get in conflict with an Indian?

MR. SACHSE: Yes, and when that happens, that's federal jurisdiction, under 18 U.S.C. 1151. And it makes a good deal of sense for the federal—

QUESTION: Is that generally or is—that's true [20] if it's on a reservation.

MR. SACHSE: If it's on a reservation, that's right.

QUESTION: But not otherwise.

MR. SACHSE: If it's off the reservation, it would —it would not, that's right; it would be State jurisdiction.

QUESTION: In a civil dispute—

MR. SACHSE: No. Excuse me, that's inaccurate. If it's not on Indian country, it would be State jurisdiction. There could be Indian country off a reservation.

QUESTION: Well, yes. Patented land is Indian country by statutory definition; correct?

MR. SACHSE: That's right.

QUESTION: In a civil dispute, under *Williams v. Lee*, isn't a federal question, it's a question for the tribal court, if it's on a reservation.

MR. SACHSE: That's correct. That within an Indian reservation, in a matter affecting Indians, the jurisdiction —the original jurisdiction, the root of the jurisdiction was tribal jurisdiction. But the federal government, through

numerous statutes, has preempted great parts of that jurisdiction. And for all major crimes, for instance, there's federal jurisdiction. But in a civil dispute between an Indian and a non-Indian on an Indian reservation, it's tribal jurisdiction.

That's *Williams vs. Lee*.

[21] QUESTION: Laying aside the major crimes question, and you had a very simple statement that I understood thoroughly for a moment or two there—when you said it desn't depend on geography or plats, it depends on the racial origin.

Now, were you confining that to reservations, as you suggested first, or to Indian country?

MR. SACHSE: I'm—that is true in Indian country. But if you—Indian country is any land inside a reservation. If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent*, and I think it would also undercut 18 U.S.C. 1151 seriously. At least for this reservation.

QUESTION: Yes, but go ahead. If the Court should hold—

MR. SACHSE: If the Court should hold that, then each one of these red spots is a little island of federal and tribal jurisdiction, and we're not in a time now when these—

QUESTION: That's the way it's been, isn't it, as my brother White suggested?

MR. SACHSE: The way it's been is that everyone has ignored both the Indian and federal rights there, and this—[22] I don't want to testify, but I don't think the Court should assume that the situation has been good, and that you can assume that because we haven't faced this issue before that it's perfectly all right to leave it another fifty years.

QUESTION: On the other hand, if the Court should decide that the statute, the cession statute didn't amount to a conveyance,—

MR. SACHSE: Yeah.

QUESTION: —then the result would be that the State would no longer have any power to enforce its laws in any of these several counties, if any Indian was involved.

MR. SACHSE: That's correct. It would be a federal question, as in any other Indian reservation,—

QUESTION: Wherever it occurred.

MR. SACHSE: —wherever it occurred, and this is something that Congress has decided is a proper way for the federal government to exercise its—

QUESTION: Well, if this is an Indian reservation.

MR. SACHSE: Yes. And whether this one is or not, it would be the same situation you're describing in other reservations of the State, that clearly are reservations.

We're speaking of the proposition that this, what we call a reservation, where a major tribe lives and where there's a major number of Indians, should be treated like the other Indian reservations in the State.

[23] QUESTION: Well, I suppose the vast proportion —this is something like, what, 27,000 non-Indians and a few, 3,000-plus Indians?

MR. SACHSE: That's right.

QUESTION: In this Lake Traverse area.

MR. SACHSE: That's correct.

But we're not trying to subject the non-Indians to federal or Indian jurisdiction except to the extent needed to fulfill the trust responsibilities—

QUESTION: Which means that whenever they're involved with an Indian—

MR. SACHSE: That's right.

QUESTION: —the State does not have any jurisdiction—

MR. SACHSE: That's correct.

QUESTION: —with respect to its civil, criminal or family or status law.

QUESTION: It was suggested that the tribe had recently passed an ordinance that asserted rather expansive jurisdiction within this area. Is that true or not?

Or do you know?

MR. SACHSE: I haven't seen it. I've heard that that's so. I suspect that it goes beyond the authority that the tribe has.

QUESTION: Because it reaches non-Indians?

[24] MR. SACHSE: Yes.

QUESTION: Well, how do we know that the tribe doesn't have authority to reach non-Indians?

MR. SACHSE: Well, the *McBratney* case and the *Draper* case in criminal matters.

QUESTION: Well, all *McBratney* says is that the State has the right to try a white man for a crime that took place on an Indian reservation. It doesn't say the tribe couldn't try him.

MR. SACHSE: Well, I suppose I just have to answer that this has been the—at least tacit holding of this Court, or assumption of the Court in a number of cases. And I refer to *Cake v. Egan*, where Justice Frankfurter tried to lay out the limits on tribal jurisdiction. And it's never been faced directly in the last ten years, perhaps, by this Court, but it has been faced before.

QUESTION: Well,—

MR. SACHSE: My time is up, and I'm feeling bad about taking all the time of my partner.

MR. CHIEF JUSTICE BURGER: We'll take care of that; you're on our time for a minute or two here.

Mr. Justice White, did you have a further question?

QUESTION: No, I didn't.

MR. CHIEF JUSTICE BURGER: We'll hear from your friend, then.

Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562).

* * * *

[18] ORAL ARGUMENT OF H. BARTOW FARR, ESQ. ON BEHALF OF U. S. AS *AMICUS CURIAE*

QUESTION: Mr. Farr, before you commence, will you help me understand the facts situation?

The main issue, as I understand it, is the boundary of the Reservation.

MR. FARR: That is right.

QUESTION: The location of the boundary. Who occupies the land within the disputed area? Do Indians still occupy part of it?

MR. FARR: There are Indians within the disputed area but I think the area is largely occupied by whites who purchased or successors of the people who purchased the open lands.

QUESTION: Right. And the principal interest of the Indian Tribe, as I understand it, is whether the Tribe or the state exercises jurisdiction within the disputed area.

MR. FARR: The Tribe and the Federal Government or [19] the state, yes.

QUESTION: Right. Well, who, in fact, has exercised jurisdiction legally? What laws have prevailed within the disputed area in recent years? How far back?

MR. FARR: Well, this is a question which I think the record is unclear on, Mr. Justice Powell. Essentially, the United States, as the United States understands the position—of course, not having been the party to the suit throughout, there has been some exercise of jurisdiction by the state, they having taken the position that this is land outside of an Indian Reservation to which their jurisdiction applies.

QUESTION: Have state criminal laws been imposed or enforced within the disputed area?

MR. FARR: I believe that the state has, you know, gone ahead and imposed state criminal law as well as,

though, I think the Federal Government and the U.S. Attorneys have also imposed some federal law but there has basically been a kind of working relationship in this area.

I am not sure how much of this is reflected by the record but I think as a practical matter that is generally what has been happening.

QUESTION: All right. Just one other question. We are not concerned with the individual title of any particular parcel of land, are we?

[20] MR. FARR: We are not.

QUESTION: Just the boundary of the reservation.

MR. FARR: That is right.

QUESTION: Right.

MR. FARR: Mr. Chief Justice and may it please the Court:

The United States is appearing this afternoon as *amicus curiae* is support of the position of the Rosebud Sioux Tribe that the decision of the Court of Appeals for the Eighth Circuit should be reversed.

We think that under the principles set forth by this Court in previous cases, particularly in *Seymour, Mattz* and *DeCoteau*, that it is clear that the acts of 1904, 1907 and 1910 did not disestablish the boundaries of the Rosebud Sioux Reservation in the areas to which they applied.

I would like to note briefly at the outset one important general point. In suggesting that Congress did not disestablish the boundaries of the Reservation in the early 1900's, we do not mean to imply that Congress expected that those boundaries and the boundaries of comparable reservations were going to continue indefinitely.

We agree that in the early 1900's, Congress contemplated at some period of time that the Reservation system would, in fact, come to an end but we believe that time was when the trust period on Indian allotments expired and the [21] assimilation of Indians and white settlers on the lands had been accomplished.

QUESTION: And in your view, it would have taken an Act of Congress later, then, to—

MR. FARR: That is corect. Congress at some point would have found that the assimilation had occurred and would have passed an Act abolishing the Reservation.

At that point, all of these lands and all of the people on it—except if the Federal Government wished to retain jurisdiction over the Indians—would have gone within state jurisdiction.

In 1934, however, as the Court is aware, Congress reversed that policy when it passed the Indian Reorganization Act and definitely extended the trust period on the Indian allotment.

I will discuss that more briefly in connection with the General Allotment Act of 1887.

Because this case involves an issue of statutory interpretation, the United States does not urge or perhaps even believe it is possible for this Court to lay down a binding fixed rule that would govern construction of acts in all similar cases.

However, we do believe it is appropriate for this Court to reaffirm the principle that except for the language of an act or the compelling legislative history, shows a clear [22] intention by Congress to contract Reservation boundaries and limit federal jurisdiction over certain areas of Indian reservations, that whenever Congress without a binding agreement opens lands to white settlers, it does not pay for them and does not guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does not remove the lands from the boundaries of the Reservation.

As this Court said in *Seymour*, discussing an act with very, very similar terms, the purpose of the 1905 Act is neither to destroy the existence of the Reservation nor to lessen federal responsibility or jurisdiction over the Indians having tribal rights on that Reservation.

Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government

has made up out of whole cloth. It is supported both by history and by the previous decisions of this Court.

To begin with, it is well-recognized that the Tribes are entitled to rely on certain rules of statutory construction. In particular, doubtful expressions are to be resolved for the benefit of the Indian.

More particularly, in cases of these types—of this type, the intent to disestablish Reservation boundaries must be made clear, either from the Act or the legislative [23] history and as this Court said in *Rice versus Olson*, the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history. All of these rules of construction apply to the case at hand.

Equally important—

QUESTION: Mr. Farr, may I interrupt you?

MR. FARR: Certainly.

QUESTION: As I understand the geography, we really are not talking about very many Indians because all of the unsold land has been restored to the Indians and all the land which was sold was sold to whites. Isn't that right?

MR. FARR: Well, those facts are true, yes. But in terms of the area in which we are talking about, we are talking about a considerable area of land in which Indians will either be able to move within federal jurisdiction or will be moving within the state jurisdiction and of course, Indians do have allotments within those open areas.

QUESTION: Within the open areas.

MR. FARR: Yes. They do.

QUESTION: But could you clarify one thing? What percentage of the—what portion of this total land was restored in 1934? How much of the original reservation is in dispute?

MR. FARR: I would love to answer that question but I have no idea.

[24] QUESTION: The record does not tell us, I take it.

MR. FARR: No.

QUESTION: But these would be probably noncontiguous parcels, wouldn't they? The would be little islands.

MR. FARR: They are likely to be, right. I mean, depending on the settlement practices and who defaulted and who did not, the lands that would be left available would be likely to be individual tracts. That is correct.

QUESTION: One more last question. Does the record tell us how many Indians live on the lands in dispute?

MR. FARR: I believe that there is a figure stated in one of the opinions below that—I think that the Reservation covers about 7,000. I think that the areas that we are talking about, the counties that we are talking about, the number of Indians is somewhere around 1,600 or 1,700. I think that is reflected in the record.

QUESTION: I see. And those would be Indians that reacquired lands or now occupy lands which were originally—

MR. FARR: Well, not necessarily. Again, they may be Indians who were allotted lands at the time that these areas were opened. When the areas were opened, Indians were first given an opportunity to select allotments within those areas.

QUESTION: Well, wouldn't, by virtue of those allotments, wouldn't that land be Indian country?

MR. FARR: That land is Indian country.

[25] QUESTION: There is no dispute about that.

MR. FARR: No, I don't believe so.

QUESTION: How many Indians occupy land over which there is a dispute? Do we know that?

MR. FARR: I do not know.

QUESTION: And there would be very few, would there not?

MR. FARR: Well, I don't know how many there would be, but I think—I might just say that the principle, I think, extends further than that because jurisdiction, if it only applies on allotments, the Indians, any time they

step off their particular allotments onto territory that is owned by a white settler may at that point be subject to state jurisdiction and that is something that clearly the Indians do not want and which is an interest we feel that we ought to protect in this case.

Turning to the General Allotment Act of 1887 briefly—

QUESTION: In other words, the nonreservation land can be and is Indian country if it is owned by the individual Indians.

MR. FARR: That is correct. That applies in—

QUESTION: And by the same token, or the other side of the same coin, within a Reservation there can be fee simple and non-Indians.

MR. FARR: Well, there can be fee simple and [26] non-Indians in terms of land ownership.

QUESTION: That is what I mean.

MR. FARR: No question. However, for purposes of jurisdiction—

QUESTION: Well, we are talking now about the geographic boundaries of the Reservation.

MR. FARR: That is correct. Now, the definition of Indian country, just to make sure that I have answered your question properly, the definition of Indian country in 1151 includes all areas including patented lands within a Reservation within Indian country and also, Indian allotments outside the boundaries of a Reservation within Indian country.

QUESTION: So within a Reservation, land owned in fee simple by non-Indians is still Indian country.

MR. FARR: That is correct.

QUESTION: Do you know what the relative proportion of whites and Indians is in the area that is disputed?

MR. FARR: If my memory serves me correctly, Mr. Justice White, I think there are somewhere around 16,000 whites and 1,600 Indians.

QUESTION: 16,000 whites and 1,600 Indians.

MR. FARR: I believe that is correct.

We also believe, in addition to the presumptions that I discussed a minute ago, that the General Allotment Act of 1887 has—that the policies and objectives of that are [27] consistent with the principle that an act such as this does not disestablish Reservation boundaries.

Although Respondents in their brief have continually turned the General Allotment Act on its head saying that it embodies the intent of Congress to disestablish Reservations, this Court has considered that precise question in several recent cases and found the opposite intent and we believe the Court correctly identified the intent of the General Allotment Act only last term in *Moe versus Confederated Salish and Kootenai Tribes,* in which you quoted from *Mattz* with approval the following language:

"Its policy, that of the General Allotment Act of 1887, was to continue the Reservation system and the trust status of Indian lands but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the Reservation could be abolished." And that is the Act of Congress that I said in answer to your question, Mr. Justice Rehnquist.

Unalloted lands were made available to non-Indians with a purpose in part of promoting interaction between the races and of encouraging Indians to adopt white ways.

QUESTION: When was that Act?

MR. FARR: That is 1887.

QUESTION: '87.

MR. FARR: Right.

[28] And in fact, Respondents have said that this Sioux Act, in fact, followed along from that general plan.

We think that that indicates that the Court has recognized an intent to retain jurisdiction and control over those lands during the trust period with the consideration of whether to end the Reservation to be made at a later time when the assimilation had occurred and we think the Court has noted that even more specifically in the cases in

which we very heavily rely on in our brief. *Seymour* and *Mattz* and also in *DeCouteau,* which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed.

In addition to these guiding principles, we also feel that the legislative history and the administrative treatment that we have set forth in our brief supports the position of the Tribe.

The remaining question then is, what is there sufficient to override this in the materials that the Court has before it?

Most importantly we call the Court's attention to the fact that there is nothing in the Act that says specifically that jurisdiction over these areas was to be given to the state.

In fact, I think, as a reading of the legislative history shows, Congress was really not concerned with the [29] jurisdiction at this point. The pressure on Congress was to open up lands for white settlers for two reasons, one, the settlers wanted the lands and two, the counties wanted a greater tax base.

Both of those objectives could be met perfectly comfortably by Congress by opening lands within the Reservation boundaries without sacrificing the principles of the General Allotment Act of 1887 which was to continue the Reservation during the period of assimilation.

QUESTION: Well, could the counties tax white-owned lands within the Reservation?

MR. FARR: Yes.

I don't believe that there is any dispute about that, but that was considered at that time and I believe, even now, would be considered land that is within the power of the state to tax.

In *DeCoteau,* in fact, discussing the—this particular conflict of policy the Court said, in 1887, the General Allotment Act was enacted in an attempt to reconcile the government's responsibility for the Indians' welfare with the

desire of non-Indians to settle upon Reservation land and we submit in this case that the best way to reconcile those and the way that Congress did reconcile them throughout this period was to continue the Reservation system but open white lands so that they would have a taxable base for the county and [30] the whites would have the additional lands.

For those reasons, as my time is getting short, I will close and simply suggest that the decision of the Court of Appeals should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Farr.

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Transcript of Oral Argument at 18-27, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 96-6281).

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[18]

ORAL ARGUMENT OF RONALD J. MANN
ON BEHALF OF THE UNITED STATES AS
AMICUS CURIAE SUPPORTING THE PETITIONER

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

The question before the Court is whether the provisions of the 1902 and 1905 acts that opened portions of the Uintah Indian Reservation to settlement by non-Indians operated to exclude from the reservation the lands that were opened to settlement.

QUESTION: Mr. Mann, let me ask you the same question that I asked Mr. Seneca. If all we have before us is the language of the 1902 act, speaking of restoration to the public domain, if land had been restored, would the reservation boundary be excluded, in your view? Was that language clear enough under the Seymour case, and DeCoteau, and some of the others?

MR. MANN: We think it's quite clear that the language would not have been sufficient to alter the boundaries of the reservation. The Court's decision—

QUESTION: How do you explain away Seymour and the other cases indicating that that language is [19] sufficient?

MR. MANN: I don't think that those cases do indicate that the language is sufficient. If I could sort of take you through the cases where this Court has referred to public domain language in statutes affecting reservations, the statute at issue in Seymour actually had also been considered by the Court in an earlier case, United States v. Pelican in 1914, but in both cases the key thing to realize is that the statute does not simply say that the land is being restored to the public domain. It states that the reservation is being vacated and restored to the public domain. Now, the word vacate in our mind carries much

more of a connotation of surrender, or cession of the type that has been required in this Court's later decisions, so that doesn't really seem to us to speak to this issue directly.

QUESTION: I would think that that phrase hurts your case rather than helps it. It shows that restored to the public domain means being taken away from the reservation.

MR. MANN: Well, no, actually—

QUESTION: Being vacated and restored to the public domain. It doesn't mean merely that white settlers are going to be allowed to come in. It means it's off the reservation from now on.

[20] MR. MANN: Well, it suggests that the reservation is being vacated, and there are a number of things that can happen when the reservation is vacated. In this particular instance, the land is being restored to the public domain.

I think that the clearest description—

QUESTION: What does that mean, though, and restored to the public domain? What do you think it means in that context?

MR. MANN: Well, the clearest explanation the Court has given in this context is in footnote 17 of the opinion in Solem, where the Court indicated that the phrase could well have referred to the fact that the lands were being made available for sale to non-Indians.

The reference to public lands in Federal statutes has traditionally referred to lands that are available for sale as opposed to lands owned by the United States that had been set aside for some other use, and that's what the Court in the Solem case referred to. The—stated that a reference to public domain in this context was perfectly consistent with a continuing reservation status.

There's no reason why lands could not be within an Indian reservation and be available for sale to non-Indians. That's the exact thing that happened in each of [21] this Court's cases involving surplus land acts in which the Court held a reservation was not diminished.

QUESTION: And you say that that's the meaning of restored to the public domain, land on reservation which is available for purchase to non-Indians is referred to as public domain.

MR. MANN: It doesn't matter whether it's on a reservation or not, but the phrase, public domain, could be understood to refer to lands that are owned by the United States that are available for sale.

QUESTION: Do you have any instance where—you say it could be. Do you have any instances where it has been, other than this statute?

MR. MANN: The statute at issue in Solem, that's what the Court indicated the most likely understanding of the—

QUESTION: That wasn't the operative language there. That was just—

MR. MANN: No, but the Court did hold that the land was on the reservation. That was the holding of the Court, and the statute stated the land was in the public domain, so the legal effect of the Solem decision is that land which Congress had described specifically as being in the public domain, albeit offhandedly, but in an act that Congress enacted and the President signed, stated that [22] that land was in the public domain, and this Court held that it remained on the reservation.

QUESTION: Well, how about the Rosebud case, where the statute said restored to the public domain resulted—

MR. MANN: Now, in that case also, you'll—if you —when you look at the Rosebud opinion, the statute to which you're referring is not the statute that was at issue before the Court, and the reference occurs in a footnote in the facts statement that described how the Rosebud Sioux Reservation came to the size that was at issue before the 1904, 1907, and 1910 acts, and if you actually look at the statute in that case it becomes fairly clear why the

parties before the Court conceded that the statute altered the boundaries of the reservation.

The title of the statute states that its purpose is to divide a portion of the reservation of the Sioux Nation into separate reservations and to secure the relinquishment of the Indian title to the remainder.

QUESTION: Well, was that mentioned in the opinion?

MR. MANN: I'm not sure whether it was or not.

QUESTION: If it wasn't mentioned in the opinion, it doesn't add anything to your argument, it [23] seems to me, to say there were even additional reasons than those mentioned in the opinion for reaching the result.

MR. MANN: Well, the opinion did not necessarily reach the result. The parties conceded that the reservation —that the land in question there has been removed from the reservation, and the Court was simply summarizing the fact that that—that the land in question was no longer part of the reservation because the Great Sioux Reservation no longer existed, and what remained was the Rosebud Sioux Reservation at issue in the case.

And then the Court went on to consider whether the Rosebud Sioux Reservation had been diminished by the statutes at issue there, so we think that was adequately explained by the fact that the parties would have had no possible basis for suggesting the reservation continued in existence in light of the clear purpose of the statute at hand.

QUESTION: Mr. Mann, in deciding whether the public domain language could mean what you claim it does mean, I suppose we look to intent, and there was a reference to congressional intent a moment ago. The conclusion that was stated was that there was no sort of specific indication, specific to the statutes involved [24] here, of congressional intent.

Isn't it fair to say, however, that if we look further into the state of the congressional enactments at the time

of the 1902, 3, 4, 5 acts, that there was very clearly a policy of the United States, an indication of the policy of the United States in effect to end the reservation system, and shouldn't we read the language in light of that broader policy?

MR. MANN: Well, this Court has had a number of cases that have considered surplus land acts from this period of time, and I think it's fair to say that—

QUESTION: And we declined to do that—

MR. MANN: —in all—in all—

QUESTION: —but were we right, or were we wrong?

MR. MANN: No, I think you were right, because the—what's going on here is, the question of whether reservation boundaries were going to be altered at the time had little practical significance, because the question of criminal jurisdiction turned on the definition of Indian country, which at the time turned solely on who owned the land, so when Congress opened the land to settlement by non-Indians, by that very action it was removing at the time the land from jurisdiction. It didn't have to consider whether it was going to alter the [25] reservation boundaries.

Now, what the Court has done is, it's assumed that if Congress intended to alter reservation boundaries, typically Congress would have stated so specifically, and it's looked very closly to the language of the statutes, and it has had a number of statutes where Congress has quite clearly stated that it intended to alter the boundaries of reservation, and those statutes appear in DeCoteau and Rosebud, and if you look at them, they quite clearly state more or less that the land is being ceded, surrendered, and conveyed, and the Indians are—

QUESTION: Well, certainly, saying more or less is really something of an understatement, because I don't recall in either of those cases that the language said, we intend to alter the boundary of the reservation.

MR. MANN: Well, the language in DeCoteau said that the Indians cede, sell, relinquish and convey to the

United States all their claim, right, title, and interest in the land in question, and the statute in Rosebud stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.

[26] QUESTION: I think you're probably right, but to —I wouldn't say that to—it is paraphrasing the language you just quoted to say, Congress says we intend to diminish the reservation.

MR. MANN: I think it is paraphrasing the language to say that that is unambiguous language of cession of the reservation from the Indian tribe to the United States.

QUESTION: Well, it was cession, but this was not cession. I mean, Congress can proceed in one of two ways, either by getting the tribe to cede it, or, if the tribe does not wish to cede it under Lone Wolf, simply declaring the reservation ended. You would not expect to have the language of cession when there's been no cession, and that's what it is asserted occurred here.

MR. MANN: Of course, the statute in Rosebud was enacted long after Lone Wolf as well, and the Indians are not consenting Congress used the language of cession. That seems to be—that phrase seems to be the phrase Congress used when it intended to alter the boundaries of a reservation.

QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear. But still, isn't it the case that in deciding what to make of the less explicit language, the reference to [27] returns to public domain, that we should construe that in light of the overriding congressional policy, which at the time, as I understand it, was to end the reservation system?

MR. MANN: Well, but the policy was that the reservation system would be ended sometime, because Congress anticipated that it would end the reservation system in the future. The concept was not to end the reservation system directly by these particular statutes. The Court has repeatedly said that some of the statutes ended them, and some of them didn't.

QUESTION: Thank you, Mr. Mann.

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